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An Unfortunate Omission: Trespass on Land No Longer a Misdemeanor.

That there would be omissions in the Code of 1919 was to be expected—some made on purpose, some by natural error. But reasons for some of the very apparent omissions are hard to be understood.

The omission of Section 2071 of the Code of 1904 (Session Acts 1805-6, p. 202, as amended by Acts 1902-4, p. 327) is much to be regretted.

Under the law of Virginia as laid down in the case of *Henderson* v. *the Commonwealth,* 8 Grat. 708, our Court of Appeals held that the mere breaking and entering of the close of another, though in contemplation of law a trespass committed *vi et armis,* is only a civil entry, to be redressed by action, and cannot be treated as a misdemeanor to be vindicated by indictment or public prosecution. It is true that this case held also that when such a breaking and entering is attended by circumstances constituting a breach of the peace, such as entering a dwelling-house with offensive weapons in a manner to cause terror and alarm to the family and inmates of the house, the trespass is heightened into a public offense and becomes the subject of a criminal prosecution. Under the wise provision of Section 2071 of the Code of 1904, the entering, where a man had been warned to keep off of another's property, was elevated into an offense to be treated criminally, and such ought to be the law now.

This Section 2071 made it unlawful to shoot, hunt, range, fish, trap or fowl on or in the lands, waters, etc., which are enclosed, or the boundaries of which, or the streams adjacent to which constitute a lawful fence, without the consent of the owner, and on lands east of the Blue Ridge on *any* lands, waters, etc., and provided a fine, upon conviction, of not less than five

nor more than fifty dollars, and this in addition to an action for damages. The section then added this very excellent provision: "And if any person *after being warned not to do so by the owner or tenant* of any premises shall go upon the land of said owner or tenant, he shall in addition to the liabilities imposed under this section be deemed guilty of a misdemeanor and upon conviction thereof punished by a fine not exceeding fifty dollars, or imprisoned in the county jail not exceeding sixty days, or both, in the discretion of the justice or jury trying the case."

As the law now stands a man may be warned time and again to keep off of another's land, but he can snap his fingers in the face of the landowner and continue trespass after trespass; for a civil suit for damages for such a trespass would in nine cases out of ten be a farce.

The danger of brawls—aye, even of bloodshed—is certainly made possible by the repeal of this act; for no man is going to quietly submit to another trespassing on his land after he has been ordered to cease doing so.

It will be seen that the word "range" is used in the earlier part of the section and the words "go upon," in the latter. Now the revisors use the word "hunt" in Section 3338, and in Section 3339 the owner, by posting notices, can prevent any person from "hunting" on his land. But a man now as the law stands can "range" at his own sweet will upon another's land and "go upon" it when and as he will, though forbidden to do so time and again.

Section 3365 continues in force all laws applicable to a designated county or counties and which relate to hunting, shooting or trespassing upon the lands of another, but of course the general law contained in Section 2071 of the Code of 1904 is repealed. It appears to us that it is hard to reconcile this section with Section 3346, which provides that "All laws or parts of laws, general, special or local, in conflict with the provisions of this chapter as to game or inland fish laws are repealed."

But to "return to our muttons." A loophole is afforded by which this former salutary act can be made the law in every county of the State, if the supervisors of the county so elect.

Under Section 2743 the supervisors have power "To prevent

trespassing by persons, animals and fowls," and we would like to see every board of supervisors enact an ordinance making it a misdemeanor to "go upon" or "range" on the land of another, when forbidden so to do by the owner or tenant of said land. Attention is called to the fact that under this section fines and imprisonment may be provided for, so that the fine does not exceed in any case fifty dollars and imprisonment thirty days.

No ordinance, as the law now stands, can be passed until notice of the intention to propose the same shall have been published for two successive weeks prior to its passage in some newspaper published in the county, etc.

Appointment of an Auditor in Jury Trials.

In the matter of Walter Peterson, Receiver, etc., decided on June 1st, 1920, by the Supreme Court of the United States, an exceedingly novel question arose, which we think will be of a good deal of interest to the profession.

Peterson brought an action at law against one Davidson, to recover a balance of $21,014.43 alleged to be due for coal sold and delivered, as shown by a long schedule annexed. The answer of the defendant admitted the items set forth but denied that it presented a full account of the transaction between the parties, and alleged that there were other deliveries of coal and other payments which defendant had made, and also that he was entitled to additional allowances.

The other alleged by way of counterclaim that the plaintiff was indebted to him for a failure to perform its contracts for coal in the sum of $9999.10.

In response to a demand for a bill of particulars defendant filed a schedule containing more than two hundred items which he proposed to establish by way of defense. Upon motion of the defendant and against the objection of plaintiff the judge in the lower court appointed an auditor, with instructions "to make a preliminary investigation as to the facts; hear the witnesses; examine the accounts of the parties, and make and file a report in the office of the clerk of this court with a view to simplifying the issues for the jury; but not finally to determine any of the

issues in the action, the final determination of all issues of fact to be made by the jury on the trial; and the auditor to have power to compel the attendance of, and administer the oaths to, witnesses; the expense of the auditor, including the expense of a stenographer, to be paid by either or both parties to this action, in accordance with the determination of the trial judge."

The auditor was further ordered to report on certain facts under ten classifications. The design of this was largely to separate items in dispute from those as to which there was no real dispute, and, also, to set forth the detailed facts on which the specific claims made were rested; but the auditor was also thereby required to express his opinion on disputed issues, thus:

> "The various penalties, commissions, cash discounts, and other deductions which defendant claims to be entitled to deduct from the invoice price of the various shipments, the items thereof which are admitted by plaintiff as proper deductions, and the items in dispute, with his opinion as to each of such disputed items.
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> "His opinion as to the net amount due on each invoice of coal sold and delivered to defendant."

Thereupon the plaintiff applied to the Supreme Court of the United States for a writ of mandamus and prohibition, praying that the judge in the lower court and the auditor named be prohibited from proceeding under the order appointing him, and praying further, that said judge, or such other judge as might at the time hold the trial term of that court, be commanded to restore the case to the trial calendar, and that the same be tried in the regular and usual way. The petition claimed that the district court was without jurisdiction to make the order appointing the auditor and that proceedings thereunder would violate the Seventh Amendment to the Federal Constitution. Objection was made by the respondent to the jurisdiction of the court and it was insisted that the district court had jurisdiction of the parties and of the cause of action, and that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury the plaintiff could protect his rights by exceptions which would be subject to review by the circuit court of appeals.

The Supreme Court overruled the objections to the jurisdiction, and as to the second question—the power of the district court—the Supreme Court of the United States held that, if under any circumstances a lower court could appoint an auditor with the duties here prescribed, without consent of the parties, the facts clearly warranted such action in this instance. Plaintiff's account contained two hundred and ninety-eight items, the defendant's, four hundred and two items, which were alleged to arise out of one hundred and twenty-three deliveries of cargoes, or partial cargoes, of coal, made on ninety-one different days, during a period of eleven months. The coal delivered was of various kinds, and the invoice price for the same kind differed from time to time. There were different claims for penaltes, commissions, cash discounts, and as to some there were claims for allowance on account of freight.

The opinion of the court delivered by Justice Brandeis is quite long and illuminating, sustaining the right of the lower court to appoint the auditor and holding it correct because the auditor would not under the ruling of the court finally determine any of the issues in the action—the final determination of all issues of fact to be made by the jury at the trial. "It is to be assumed," the court says, "that if accepted by the court, the report of the auditor would be admitted at the trial before the jury as *prima facie* both of the evidentiary facts and of the conclusions of fact therein set out. The report being evidence sufficient to satisfy the burden of proof, would tend to dispense with the introduction at the trial before the jury, of evidence on any matter not actually in dispute. The appointment of the auditor would thus serve to shorten the jury trial by reducing both the number of facts to be established by evidence, and the number of questions in controversy. A more intelligent consideration of the issues submitted to the jury for final determination would result. Judge Brandeis then goes into a discussion of the history of the appointment of auditors which we think worth repeating.

Prior to the adoption of the Federal Constitution there did not exist in England, or, so far as appears, in any of the colonies, any officer, permanent or temporary, who, in connection with

trials by jury, exercised the powers of an auditor above described. An official called "auditor" had long been known as part of the judicial machinery in certain cases brought in the common-law courts both of England and of the colonies: but the functions of the auditor in those cases were different. In the common-law action of account auditors were appointed in England, from the earliest times, to take the account, after the interlocutory judgment *quod computet* has been entered. But the parties were entitled to a jury trial before the interlocutory judgment was rendered; and further issues of fact arising before the auditor were not passed upon by him, but were certified to the court for trial by a jury. The use of this form of action was limited to cases where the defendant was under obligation to account to the plaintiff as guardian, bailiff, or receiver of his property [1] In Maryland, by Act of 1785, chap. 80, § 12, the power of the court to appoint auditors was extended to all cases in which it might be necessary to examine and determine accounts; but the jury trial was not affected thereby, for the proceedings thereon were to be "as in cases of account." [2] In Connecticut auditors were appointed by the court in actions of "book debt," and the same practice was early introduced in Vermont and other states; but in this action the report of the auditor, if accepted by the court, is a substitute for the jury, and operates to determine the issues of fact.[3] In New York actions on long accounts are determined now, as in colonial days, by referees instead of by a jury.[4]

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1. See Prof. Langdell, 2 Harvard L. Rev. 241, 251-255; Holmes *v.* Hunt, 122 Mass. 505, 512, 23 Am. Rep. 381.

2. See United States *v.* Rose, 2 Cranch, C. C. 567, Fed. Cas. No. 16,193; Barry *v.* Barry, 3 Cranch, C. C. 120, Fed. Cas. No. 1,060; Bank of United States *v.* Johnson, 3 Cranch, C. C. 228, Fed. Cas. No. 919. The report was not admitted before the jury as prima facie evidence of the truth of the statements or conclusions of the auditor. McCullough *v.* Groff, 2 Mackey, 361, 366.

3. Sulzer *v.* Watson, 39 Fed. 414; Conn. Gen. Stat. 1918, § 5752; Act of Vermont, October 21, 1782, Slade's Vermont State Papers, 456; Hall *v.* Armstrong, 65 Vt. 421, 20 L. R. A. 366, 26 Atl. 592; Wagner's Stat. (Mo.) 1041, § 18; Edwardson *v.* Karnhart, 56 Mo. 81.

4. Steck *v.* Colorado Fuel & I. Co., 142 N. Y. 236, 25 L. R. A. 67, 37 N. E. 1. This fact has no bearing on the constitutional ques-

The office of auditor, with functions and powers like those here in question, was apparently invented in Massachusetts. It was introduced there by chapter 142 of the act of the legislature of the year 1818; and as a part of the judicial machinery it has measured the fullest development in that State. No Act of Congress has specifically authorized the adoption of the practice in the Federal Courts. We have therefore to decide not only whether such appointment of auditors is consistent with the constitutional right of trial by jury, but also whether it is a power inherent in the District Court or a trial court."

The court further holds that the command of the Seventh Amendment that "The right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained; citing numerous cases. It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of them an efficient instrument in the administration of justice—indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed and that the ultimate determination of issues of fact by the jury be not interfered with.

We cannot agree, however, with the learned justice in the statement, "No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined." Certainly this is not the law in Virginia, and is probably a somewhat careless statement. A man is entitled to a jury trial in any case brought against him on the law side of court, and it is not for the court to say whether he is entitled to a jury trial or not before the case is heard. But we agree with the learned judge that the requirement of a preliminary hearing does not infringe upon the constitutional right, either because it

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tion involved here. The right to a jury trial guaranteed in the Federal Courts is that known to the law of England, not the jury trial as modified by local usage or statute. U. S. *v.* Wonson, 1 Gall 5; Cap. Trac. Co. *v.* Hof, 174 U. S. 1.

involves delay in reaching the jury trial or because it offers opportunity for exploring in advance the evidence which the adversary proposes to introduce before the jury. The danger in the case is that an order of this kind directing the auditor to form and express an opinion upon facts and items in dispute might carry undue weight with the jury. It is true it will only be taken as *prima facie* evidence and the parties will be free to call, examine and cross-examine witnesses as if a report had not been made.

It seems that this method of arriving at the truth in complicated accounts in trials before juries has obtained in Massachusetts for some time and there is a statute in that State making the report of an auditor *prima facie* evidence at the trial before the jury, and this statute has been held constitutional. The practice thus established in Massachusetts has been followed in the southern district of New York and in the eastern district of Tennessee. We must confess that it strikes us this is a most excellent method of getting at the truth. We have known case after case of complicated accounts in which the verdict of the jury has been shown to be either a mere guess on their part, or a compromise; and could all the items and facts in complicated accounts be submitted to a trained auditor, with the right, of course, to call witnesses, and to call the auditor to explain the items, the administration of justice would certainly be aided and time saved. It might seem a somewhat startling innovation in our courts but we believe it would be an excellent thing to do.

The 18th Amendment: Concurrent Power.

It is with a feeling of distinct disappointment that one reads what is called the opinion of the Supreme Court of the United States in the various cases taken up testing the constitutionality of the Prohibition Amendment to the Constitution and the questions raised thereunder. The matter is one of far-reaching import and we can well understand and thoroughly agree with the statement of Mr. Justice White when he says, "I profoundly regret that in a case of this magnitude, affecting, as it does, an amendment to the Constitution dealing with the powers and duties of the

National and State Governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions, without any exposition of the reasoning by which they have been reached."

The opinion of the court is not an opinion but merely a decision, and leaves nearly every great question open to future litigation. The Chief Justice in his concurring opinion briefly treats of the question of concurrent and the contention of the plaintiffs jurisdiction, but concludes: "Comprehensively looking at all of these contentions, the confusion and contradiction to which they lead serve in my judgment to make it certain that it cannot possibly be that Congress and the States entered into the great and important business of amending the Constitution in a matter so vital and concerning all the people, solely in order to render governmental action impossible, or, if possible, to so define and limit it as to cause it to be productive of no results, and to frustrate the obvious intent and general purpose contemplated. It is true, indeed, that the mere words of the second section tend to these results, but if they be read in the light of the cardinal rule which compels the consideration of the text in view of the situation and the subject with which the amendment dealt, and the purpose which it was intended to accomplish, the confusion will be seen to be only apparent."

This was referring to the contention that it required the concurrent action of Congress and the States in order to carry this amendment into effect.

The Chief Justice then goes on: "In the first place it is indisputable, as I have stated, that the first clause imposed a general prohibition, which it was the purpose to make universally and uniformly operative and efficacious. In the second place, as the prohibition did not define the intoxicating beverages which it prohibited, in the absence of anything to the contrary, it clearly from the very fact of its adoption, casts upon Congress the duty not only of defining prohibited beverages but also of enacting such regulations and sanctions as were essential to make them operative when defined. In the third place, when the second section is considered with these truths in mind, it becomes clear that it simply manifests a like purpose to ad-

just as far as possible the exercise of the new powers cast upon Congress by the amendment to the dual system of government existing under the Constitution. In other words, dealing with the new prohibition created by the Constitution operating throughout the length and breadth of the United States, without reference to state lines, or the distinctions between state and federal power, and contemplating the exercise by Congress of the duty cast upon it to make the prohibition efficacious, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment, and the legislation of Congress enacted to make it completely operative."

Mr. Justice Reynolds concurs, but says: "It is impossible now to say with fair certainty what construction should be given to the 18th Amendment. Because of the bewilderment which it creates a multitude of questions will inevitably arise to demand solution here. In the circumstances I prefer to remain free to consider these questions when they arise."

No one will for a moment hesitate to agree that the bewilderment which this 18th Amendment has created is one which must always occur when a sumptuary law of this character is enacted, and we predict for it in the future almost as many decisions as the 14th Amendment has given rise to.

Mr. Justice McKenna dissents, and he also seems somewhat bewildered by the fact that the court, in rendering its decision, declares conclusions, only, without giving any reasons for them. He says: "The instance may arise—establishing the precedent now, hereafter wisely to be imitated. It will undoubtedly decrease the literature of the court, if it does not increase its lucidity."

We congratulate the learned Justice upon the last sentence. I am afraid that too often now-a-days we have from the courts much literature without lucidity. But the learned Justice in his dissenting opinion, which is quite lengthy, treats of the question of concurrent power and jurisdiction, and draws the deduction, which he says is unavoidable, that there must be united action between the States and Congress, or at any rate, concurrent and harmonious action; and wisely states as follows: "Will not such action promote better the purpose of the amend-

ment? Will it not bring to the enforcement of prohibition the power of the states and the power of Congress, make all the instrumentalities of the state, its courts and officers, agencies of the enforcement, as well as the instrumentalities of the United States, its courts and officers, agencies of the enforcement?" Will it not bring to the states, as well as preserve to them, a partial autonomy, satisfying, if you will, their prejudices, or better say, their predilections? And it is not too much to say that our dual system of government is based upon them. And this predilection for self-government the 18th Amendment regards and respects, and by doing so sacrifices nothing of the policy of prohibition."

He does not agree with the majority of the Court and with the Chief Justice that, to require such Concurrence is to practically nullify the Prohibition Amendment; for without legislation its prohibition would be ineffective, and that it is impossible to secure the Concurrence of Congress and the States in legislation. Justice McKenna states that he could not assent to these propositions. He believes that it will require a little time to achieve the purpose of the amendment, which may require some adjustment before its ultimate achievement can be had. He states that the conveniences and inconveniences of this concurrent power of Congress and the States are obvious and do not need to be stated, as the courts have nothing to do with them when the law-making power has spoken. He congratulates himself that while he is alone in his dissent, his views are consistent with those entertained by the majority membership of the Judiciary Committee of the House of Representatives, as expressed in its report upon the Volstead Act.

It is rather curious to notice that in the various opinions upon this act the Chief Justice "regrets," Mr. Justice Reynolds speaks of the "bewilderment" which the act creates, and Mr. Justice McKenna speaks of the Government as seeking relief "from the perturbation of mind and opinions" produced by departure from the words of the second Section of the amendment. We heartily agree with all three of these conclusions, regret, bewilderment, and perturbation of mind, which in our judgment will long continue when this act and the cases arising under it come before the courts in future.